

No. 07-8521

In the Supreme Court of the United States

EDWARD JEROME HARBISON, PETITIONER

v.

RICKY BELL, WARDEN
(CAPITAL CASE)

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING THE
JUDGMENT BELOW**

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QUESTIONS PRESENTED

Section 3599 of Title 18, United States Code, provides federal funding for counsel for indigent defendants and postconviction litigants in federal proceedings involving a death sentence. The questions presented are:

1. Whether a district court's order denying a request for federally funded counsel under Section 3599 may be appealed without a certificate of appealability issued pursuant to 28 U.S.C. 2253(c).

2. Whether Section 3599 provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law.

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INTEREST OF THE UNITED STATES

The principal question presented is whether state prisoners who have been sentenced to death are entitled to federally funded counsel to pursue clemency. Such federal funding would be drawn from the same congressional appropriation that pays for representation for federal capital defendants prosecuted by the United States. The Attorney General also reviews the adequacy of state funding for capital defendants' postconviction counsel, see 28 U.S.C. 2265, and through federal grants implements the federal policy of encouraging States to provide compensation, resources, and other support to counsel for indigent capital defendants, see 42 U.S.C. 14163-14163e (Supp. V 2005).

This case also presents the threshold question whether petitioner was required to obtain a certificate of appealability (COA) under 28 U.S.C. 2253(c), which governs appeals in federal postconviction proceedings as well. The United States has participated in other cases involving the interpretation of Section 2253(c). See *Slack v. McDaniel*, 529 U.S. 473 (2000); *Hohn v. United States*, 524 U.S. 236 (1998).

The United States accordingly has a substantial interest in the resolution of both questions. At the Court's invitation, the Solicitor General filed a brief expressing the views of the United States on whether certiorari should be granted.

STATEMENT

1. Congress provides indigents with federally funded counsel and other services in certain federal proceedings involving a death sentence. See 18 U.S.C. 3599. To qualify, indigents must fall into one of two categories, which the statute enumerates separately. First, indigent defendants are eligible if they face one or more federal charges for which the maximum penalty is death. 18 U.S.C. 3599(a)(1). Second, indigent prisoners seeking postconviction relief in federal court under 28 U.S.C. 2254 or 2255 are eligible if they are “seeking to vacate or set aside a death sentence.” 18 U.S.C. 3599(a)(2). Under the latter provision, state prisoners sentenced to death become eligible for federally funded counsel when they challenge their sentences in federal court under 28 U.S.C. 2254.

Eligible indigents are entitled to federally funded counsel who meet specified qualifications. See 18 U.S.C. 3599(b) and (c). They may also receive funding for “in-

investigative, expert, or other services” when those services are “reasonably necessary.” 18 U.S.C. 3599(f).

Appointed counsel continue to represent the defendant or prisoner “throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process.” 18 U.S.C. 3599(e). Counsel’s representation also extends to “applications for stays of execution and other appropriate motions and procedures.” *Ibid.* Relevant here, counsel “shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.” *Ibid.*

Section 3599 was originally enacted as part of the statute creating a new federal capital offense of drug-related homicide and specifying sentencing procedures, and it was originally codified at 21 U.S.C. 848(q)(4)-(10) (1988). Anti-Drug Abuse Act of 1988 (1988 Act), § 7001(b), 102 Stat. 4388-4395, Pub. L. No. 100-690. In 2006, Congress determined that the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, would provide the exclusive framework for imposing a federal death sentence. Congress accordingly repealed the death-penalty procedures in Title 21 and moved the statute providing for appointment of counsel, without substantive change, to its current location at 18 U.S.C. 3599, in the same chapter as the FDPA. See Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, Tit. II, §§ 221(4), 222, 120 Stat. 231-232 (2006).

2. In 1983, in Chattanooga, Tennessee, petitioner bludgeoned Edith Russell to death when she surprised him while he was burglarizing her house. Following a

jury trial in a Tennessee state court, petitioner was convicted of first-degree murder, second-degree burglary, and grand larceny. He was sentenced to death as a result of his murder conviction. The Tennessee Supreme Court affirmed petitioner's convictions and death sentence. *State v. Harbison*, 704 S.W.2d 314, 315-316, cert. denied, 476 U.S. 1153 (1986).

Petitioner thereafter filed a petition for state post-conviction relief through new counsel. After an evidentiary hearing, the state trial court denied the petition. The Tennessee Court of Criminal Appeals affirmed, *Harbison v. State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (May 20, 1996), and the Tennessee Supreme Court denied discretionary review.

3. In February 1997, petitioner moved the United States District Court for the Eastern District of Tennessee to stay his execution and appoint counsel to represent him in filing a federal habeas petition, pursuant to the statute now codified as Section 3599. The motions were granted, and the district court appointed Federal Defender Services of East Tennessee, Inc. (Federal Defender Services) to represent petitioner. *Harbison v. Bell*, 408 F.3d 823, 827 (6th Cir. 2005), cert. denied, 547 U.S. 1101 (2006); see Pet. Br. App. 27a.

Through Federal Defender Services, petitioner filed a federal habeas petition challenging his conviction and death sentence. The district court denied habeas relief. Petitioner obtained a certificate of appealability (COA) on three claims, but on review the Sixth Circuit affirmed the denial of his habeas petition. *Harbison*, 408 F.3d at 837. Petitioner unsuccessfully sought postjudgment relief from the denial of his first habeas petition or, in the alternative, permission to file a second or successive federal habeas petition. See Pet. Br. App. 6a-11a, 12a.

This Court denied his petitions for a writ of certiorari. 128 S. Ct. 1479 (2008).

The Tennessee Supreme Court set an execution date and appointed the state Office of the Post-Conviction Defender to represent petitioner in any final state-court proceedings. Pet. Br. 8. Tennessee authorizes the Post-Conviction Defender to represent capital inmates in executive clemency proceedings as well. Tenn. Code Ann. § 40-30-206(e) (2006). The Tennessee Supreme Court has since clarified, however, that the Post-Conviction Defender has the discretion to decide whether to take on a clemency representation and that the court will not order the Defender to do so in a particular case. *State v. Johnson*, No. M1987-00072-SC-DPE-DD, 2006 Tenn. LEXIS 1236 (Oct. 6, 2006). The Post-Conviction Defender does not wish to represent petitioner in clemency, citing resource constraints. Mot. for Leave to Expand Appointment Order, 1:97-CV-52 Docket entry No. 156, Attach. F (E.D. Tenn. Dec. 13, 2006); see Pet. Br. App. 27a.

4. In December 2006, petitioner moved the federal district court to expand the appointment of counsel and permit Federal Defender Services to represent him in state clemency proceedings in the event that his efforts to obtain judicial relief should fail. Petitioner asserted that the expanded appointment was authorized by Section 3599 and by 18 U.S.C. 3006A(a)(2)(B), which permits a district court to appoint “representation * * * for any [indigent] person who * * * is seeking relief under [28 U.S.C. 2254].” See Pet. Br. App. 28a & n.6.

The district court denied the motion. Pet. Br. App. 26a-31a. The question “whether [Section 3599], which authorizes the appointment of *federal* habeas corpus counsel, extends that appointment to *state* clemency pro-

ceedings,” the district court stated, was resolved by the Sixth Circuit’s holding “in a closely analogous situation.” *Id.* at 28a. The court explained that the Sixth Circuit, sitting en banc, had unanimously rejected a prisoner’s request for his federally funded counsel to assist him in seeking *state* postconviction relief, holding: “The two representations shall not mix. The state will be responsible for state proceedings, and the federal government will be responsible for federal proceedings.” *Id.* at 29a (quoting *House v. Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (en banc)). In the district court’s view, that “simple” rule showed that the Sixth Circuit “would follow the same reasoning if asked to determine whether the statute provides for federally-appointed counsel during state clemency proceedings.” *Ibid.* (quoting *House*, 332 F.3d at 999).

5. Petitioner appealed. The court of appeals directed him to file an application for a COA, which he did. The appeal proceeded on those papers, *i.e.*, without separate merits briefing.

The court of appeals affirmed. Pet. Br. App. 5a-14a. The court first observed that it was “not clear” that petitioner’s appeal required a COA and stated that, if it reached the issue, it would conclude “that no COA was required.” *Id.* at 11a.

The court of appeals then held that its en banc decision in *House* foreclosed petitioner’s interpretation of Section 3599, which “does not authorize federal compensation for legal representation in state matters.” Pet. Br. App. 11a. The court therefore held that if petitioner were required to obtain a COA, it would deny one because circuit precedent was clear. See *ibid.* The court concluded that it would both “[d]eny the motion for a COA for [Federal Defender Services] to represent [peti-

tioner] in state clemency proceedings” and “[a]ffirm the district court.” *Id.* at 12a. Judge Clay dissented on other issues. *Id.* at 12a-14a.

6. Petitioner’s execution was subsequently enjoined when petitioner, represented by Federal Defender Services, challenged Tennessee’s lethal-injection protocol in a Section 1983 action in another court. *Harbison v. Little*, 511 F. Supp. 2d 872 (M.D. Tenn. 2007), appeal pending, No. 07-6225 (6th Cir. filed Oct. 11, 2007). The injunction remains in place while the Sixth Circuit entertains briefing on the impact of *Baze v. Rees*, 128 S. Ct. 1520 (2008).

SUMMARY OF ARGUMENT

I. A COA is unnecessary for petitioner to appeal the denial of funding for state clemency counsel under 18 U.S.C. 3599. A federal district court’s order concerning the scope of appointed counsel’s representation outside the confines of federal habeas corpus is not a “final order in a habeas corpus proceeding,” 28 U.S.C. 2253(c)(1)(A), and that order therefore may be appealed without a COA.

II. Section 3599 does not authorize federal funds for indigent state capital defendants seeking state clemency. Section 3599 provides funds for counsel for federal defendants facing a capital charge or prisoners actually sentenced to death and seeking postconviction relief in federal court. The entire structure of the statute focuses on federal proceedings, from the requirement that attorneys be admitted to practice in federal court to the types of proceedings in which attorneys are authorized to participate.

Petitioner seeks to expand the scope of Section 3599 to cover state proceedings as well. In his view, once a

state prisoner comes to federal court seeking relief from his death sentence, his federally funded counsel must continue to represent him in state proceedings as well—here, proceedings before the Governor of Tennessee seeking executive clemency. That position is unsupported by the text and structure of Section 3599, contradicts the legislative history, and would create needless friction between federal habeas corpus and a subset of state capital proceedings.

Petitioner’s reading would likely compel federal courts to approve funding not just for clemency counsel, but for counsel in *all* state proceedings that follow a federal habeas petition. Congress did not intend that result. Contrary to petitioner’s view, the omission of the word “federal” to describe the proceedings funded by Section 3599(e) does not mean that Congress intended to fund counsel in state proceedings that follow federal habeas. Rather, it reflects the fact that the structure of the statute has already made clear that federal funding is intended only for federal proceedings.

Petitioner contends that he is entitled to receive funding for *all* of the proceedings listed in Section 3599(e), and that because “clemency” proceedings are listed, he must be entitled to funding for *state* clemency proceedings because that is the only form of clemency open to him as a Tennessee prisoner. But Section 3599(e)—which was written principally for federal defendants on direct review—underwrites counsel only for particular federal proceedings that are “available” to particular defendants. State prisoners who cannot receive federal clemency therefore cannot receive federal funding for clemency proceedings.

Petitioner’s final argument is that “executive or other clemency” cannot be limited to proceedings on the

federal level because only the States have “other clemency.” But that phrase cannot bear the weight petitioner places upon it: Congress more likely meant to include clemency proceedings not conducted by Executive Branch officials, such as the clemency boards, made up of private citizens, that some previous Presidents have used to assist in the clemency process.

If further confirmation is necessary to show that Section 3599 is limited to federal proceedings, it comes from Congress’s ratification of the consensus position in the federal courts of appeals when it recodified the counsel-funding provision in 2006. At the time Congress finalized the relevant text of the recodifying statute, three courts of appeals agreed that the provision applied only to federal proceedings, and none had definitively held otherwise.

Finally, Congress’s decision to limit federally funded counsel to federal proceedings is sensible. Federal habeas proceedings, unlike state clemency proceedings, are the primary forum for vindication of federal constitutional rights. Congress could (and did) sensibly decide not to fund counsel for the inherently discretionary process of state clemency, which predominantly involves subjective considerations unrelated to federal rights. While counsel may play a useful role in this process, as Congress has recognized by providing clemency counsel to indigent federal defendants, nothing suggests that Congress has a unique role to play in this area. Moreover, Congress could have reasonably concluded that funding lawyers with federal tax monies to appear before state tribunals for the purpose of upsetting state convictions would present unique federalism concerns.

ARGUMENT**SECTION 3599 AUTHORIZES FEDERAL FUNDING ONLY FOR COUNSEL IN FEDERAL PROCEEDINGS, AND DOES NOT EXTEND TO STATE PROCEEDINGS**

The court of appeals' judgment is correct. First, no COA is required for petitioner to pursue an appeal seeking counsel fees under Section 3599. Second, Section 3599 is limited to federal proceedings and thus does not afford funding for counsel in state clemency proceedings.

I. THE COURT OF APPEALS PROPERLY EXERCISED APPELLATE JURISDICTION WITHOUT GRANTING A COA

As set out in the government's brief at the petition stage, the court of appeals should have definitively determined whether petitioner required a COA to appeal the denial of his motion to expand the scope of his habeas counsel's appointment, because the COA requirement (when it applies) is a "jurisdictional prerequisite" to taking an appeal in a habeas case. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court of appeals' failure to resolve that threshold issue, however, does not affect this Court's review of the merits, because petitioner was not required to obtain a COA.

As relevant here, the COA requirement applies to "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. 2253(c)(1)(A). The district court's order denying petitioner federally funded clemency counsel is a "final" one, because it leaves no matters pending and is appealable immediately.¹ And peti-

¹ Habeas petitioners have occasionally suggested that no COA is required to appeal from some final orders, such as those denying a post-

tioner is in custody pursuant to the judgment of a state court. But petitioner’s motion for federally funded clemency counsel is not substantively part of a “habeas corpus proceeding.”

A habeas corpus proceeding, for purposes of the COA statute, is primarily one in which the petitioner seeks to challenge his confinement based on an alleged violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. 2241(c)(3); cf. *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (stating that “‘core’ habeas corpus relief” includes “requests [for] present or future release”). Orders of the district court resolving the merits of the federal claim (on procedural or substantive grounds) are “final order[s] in a habeas corpus proceeding,” for which a COA is required. Cf., e.g., *Slack v. McDaniel*, 529 U.S. 473, 484-485 (2000) (applying the COA requirement to procedural orders).

Requests for clemency counsel, by contrast, do not involve the pursuit of any federal legal challenge to the petitioner’s conviction or death sentence. Cf. *Gonzalez v. Crosby*, 545 U.S. 524, 530, 533 (2005) (the term “habeas corpus application” in 28 U.S.C. 2244(b) does not cover a postjudgment motion unless that motion contains a federal “claim” for relief). Reimbursement of counsel formerly was handled ex parte, see 21 U.S.C. 848(q)(9) and (10) (1994), and, even now, counsel may pursue fees in their own names, potentially even under a separate docket number, in some cases after their cli-

judgment motion under Rule 60(b) of the Federal Rules of Civil Procedure, on the theory that the phrase “*the* final order” in Section 2253(c)(1)(A) covers only appeals from the one ultimate, dispositive order resolving a habeas proceeding. Petitioner does not make that argument here, and it is not correct, as the courts of appeals have broadly recognized. See U.S. Cert. Amicus Br. 19 n.8.

ents have been executed. See, e.g., *Hain v. Mullin*, 436 F.3d 1168, 1171 (10th Cir. 2006) (en banc); *Clark v. Johnson*, 278 F.3d 459, 460 (5th Cir.), cert. denied, 537 U.S. 1079 (2002). See also *McFarland v. Scott*, 512 U.S. 849 (1994) (holding that counsel may be appointed under what is now Section 3599 before a habeas corpus proceeding is actually commenced).

Indeed, the statutory standard for granting COAs—“a substantial showing of the denial of a constitutional right,” 28 U.S.C. 2253(c)(2)—would be difficult to apply to a request for clemency counsel. Although the goal of clemency is relief from the conviction or sentence, that relief comes on discretionary rather than legal grounds. See *Herrera v. Collins*, 506 U.S. 390, 413 (1993) (“A pardon is an act of grace.”) (quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.)). Neither a clemency application nor a request for counsel to pursue clemency implicates a constitutional right. And although the *handling* of a clemency application may implicate procedural due process rights, see *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), any claim of constitutional violation would be brought only after the clemency process had begun and would be asserted under 42 U.S.C. 1983, not in a habeas corpus proceeding. See 523 U.S. at 277.

II. THE COURT OF APPEALS CORRECTLY DENIED FUNDING FOR STATE CLEMENCY COUNSEL

Petitioner invokes Section 3599 as a means to pay for counsel in post-litigation state clemency proceedings. But nothing in Congress’s design for Section 3599 indicates an intention to pay for counsel in state proceedings. As a part of the first federal death-penalty statute enacted under this Court’s modern capital-sentencing

jurisprudence, Section 3599 focuses primarily on the needs of federal defendants. The statute then makes similar resources available to state death-row inmates, but *only* in challenging their capital sentences in federal court, on federal grounds, pursuant to Section 2254, the federal habeas statute. Section 3599 therefore does not provide state prisoners with funding for state motions for a new trial, state applications for stay of execution, state retrials, or state clemency proceedings.

A. Section 3599’s Text And Structure Focus Entirely On Federal Proceedings

The provision of Section 3599 at issue here is Subsection (e), which sets out the scope of federally funded attorney representation for eligible indigents. Petitioner’s central premise is that Subsection (e) must permit state prisoners to receive federally funded counsel for state clemency proceedings, because qualifying state prisoners must be entitled to receive every service listed in Subsection (e) and state prisoners cannot receive federal clemency. But petitioner’s premise is flawed. Properly understood in light of the rest of Section 3599, Subsection (e) authorizes federally funded counsel to conduct only federal proceedings, and as a result some of the services listed in Subsection (e) apply only to federal defendants and Section 2255 movants.²

² Petitioner is wrong in his assertions that “[t]he only proceedings that may be brought under Section 2254 are those instituted by *state* prisoners,” to whom federal executive clemency is useless. Pet. Br. 21; see Pet. Br. 22. In fact, some Section 2254 petitioners *are* eligible for clemency from the President. Prisoners in U.S. territories may seek Section 2254 relief. See, e.g., *White v. Klitzkie*, 281 F.3d 920, 923 n.3 (9th Cir. 2002); see also *Maddox v. Elzie*, 238 F.3d 437, 442 (D.C. Cir.) (“[T]he question whether a [District of Columbia] prisoner should be treated as a State prisoner for purposes of § 2254 is an open question

1. Section 3599(a) makes two different groups of indigents eligible for federal funding: federal defendants, who qualify under Subsection (a)(1), and federal and state postconviction litigants, who qualify under Subsection (a)(2). The services that appointed counsel provide are enumerated in Subsection (e). The latter provision is not divided into paragraphs corresponding to federal defendants and postconviction litigants; rather, it contains a single list of services. Petitioner contends (Br. 21-22) that he is entitled to clemency counsel simply because clemency proceedings are on that list. The context, however, makes clear that not every listed service applies to both categories of indigent clients.

Rather, as Subsection (e) emphasizes repeatedly, appointed counsel are to perform only those listed services that are “available” to the particular defendant or postconviction litigant. See 18 U.S.C. 3599(e) (“[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of *available* judicial proceedings, * * * and all *available* post-conviction process, together with * * * *appropriate* motions and procedures, and * * * such competency proceedings

in this circuit.”), cert. denied, 534 U.S. 836 (2001). The President’s pardon power extends to offenses under territorial and D.C. law (although today the President generally allows territorial governors to exercise their concurrent pardon power, see 28 C.F.R. 1.4). Indeed, several Presidents have commuted territorial death sentences, see, *e.g.*, *Biddle v. Perovich*, 274 U.S. 480, 485, 487 (1927) (detailing President Taft’s commutation of a death sentence imposed under the Criminal Code of the Territory of Alaska), although no territory currently has the death penalty. Thus, while state prisoners like petitioner cannot receive federal clemency, that will not necessarily always be true of Section 2254 petitioners.

and proceedings for executive or other clemency as may be *available* to the defendant.”) (emphases added).

For instance, “pretrial proceedings,” “trial,” and “sentencing” are most naturally read to apply only to a federal criminal defendant who receives counsel before trial. Those stages are not “available judicial proceedings” to postconviction litigants. Similarly, although a state prisoner might wish to file “motions for new trial” in state court, the way the term appears in context—between “sentencing” and “appeal”—shows that it refers to motions for new trial filed in the ordinary sequence of events, *i.e.*, before direct appellate review. That understanding naturally limits these filings to federal court. Because state prisoners should already have completed these phases when they become eligible for federal habeas review and, as a result, for federally funded counsel, those prisoners logically are not intended to receive federal funding for state-court filings—even if those filings could be given the same name as one of the pleadings set out in Section 3599(e) (such as a “motion for new trial” or “other appropriate motions”).

Petitioner suggests (Br. 25) that the mere fact that Section 3599(e) does not use the word “federal” is dispositive as a matter of “plain meaning.” But “the meaning of statutory language, plain or not, depends on context.” *Holloway v. United States*, 526 U.S. 1, 7 (1999) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991)). And the context here makes plain that the proceedings listed in Subsection (e) are federal ones. Indeed, the word “federal” does not appear in Subsection (a)(1), which affords “a defendant” the right to federally funded counsel in capital cases, but the statute’s structure makes clear that this provision benefits only

federal defendants—not every capital-murder defendant in the country.

2. The provisions governing appointed counsel’s qualifications confirm the inference that only federal proceedings are covered. Section 3599 generally requires that appointed counsel be admitted to practice in the appropriate *federal* court—the district court for counsel appointed before judgment, the court of appeals for counsel appointed afterward. 18 U.S.C. 3599(b) and (c). There is no requirement that counsel for a state prisoner be admitted to practice in that State, indicating that Section 3599 does not contemplate funding proceedings before state tribunals that would require such a bar admission. Cf. Fla. Stat. Ann. § 27.40(4) (West Supp. 2008) (court-appointed counsel, which include clemency counsel, must be Florida Bar members).³

As the Eleventh Circuit has noted, petitioner’s reading of the statute would “seem to entitle habeas petitioners—if successful in having their state convictions vacated in federal court—to federally funded counsel for their resulting new state trial, state appeal, and state habeas proceedings.” *King v. Moore*, 312 F.3d 1365, 1367, cert. denied, 537 U.S. 1069 (2002). The statutory qualifications, which focus only on ability to practice in federal court, therefore cut against petitioner’s reading. An appellate lawyer who wins a federal habeas appeal may well lack the necessary bar admission or courtroom skills to represent the client at a new trial in state court.

3. Similarly, reading Section 3599 together with Section 2254 (the habeas corpus provision under which a

³ Nor is there any provision for the federal appointment to override the otherwise applicable bar membership rules. Cf. 28 U.S.C. 517 (permitting the Attorney General to direct any officer of the Department of Justice to represent the United States in any federal or state court).

state prisoner must proceed in order to secure counsel under the federal statute) demonstrates that Congress would not have contemplated federal funding for *state* “motions for new trial, appeals, * * * post-conviction process, * * * applications for stays of execution [or] other appropriate motions.” Section 2254(b)(1) codifies the longstanding requirement that *all* claims presented in a federal habeas petition be properly exhausted. See generally *Rhines v. Weber*, 544 U.S. 269, 273-274 (2005). On petitioner’s reading, a prisoner who invokes federal habeas jurisdiction immediately becomes entitled to federally funded counsel who can promptly return to state court on the prisoner’s behalf, to exhaust any claims that had not previously been presented. Prisoners would have a significant incentive to file mixed or unexhausted federal habeas petitions, because the federally appointed counsel would promptly seek a stay and return to state court to begin exhausting. See, e.g., *House v. Bell*, 332 F.3d 997, 998 (6th Cir. 2003) (en banc) (Federal Defender Services sought funding to pursue new claims in state court while federal habeas appeal was pending); *Sterling v. Scott*, 57 F.3d 451, 453 (5th Cir. 1995) (federally appointed counsel filed 34 new, unexhausted claims for relief and sought federal funding to exhaust them in state court), cert. denied, 516 U.S. 1050 (1996); *In re Lindsey*, 875 F.2d 1502, 1504-1505 (11th Cir. 1989) (after federal habeas relief was denied and successive federal petition raising competency claim was dismissed as unexhausted, habeas petitioner sought appointment of new counsel and expert psychiatrist to pursue competency claim in state court). The federal habeas statutes—including the exhaustion requirement and the provision tolling the federal statute of limitations while a petition for state relief is pending, 28 U.S.C. 2244(d)(2)—en-

courage precisely the opposite practice: petitioning for relief in federal court should come only after thorough litigation in state court. See *Rhines*, 544 U.S. at 277 (a rule that “decreas[es] a petitioner’s incentive to exhaust all his claims in state court prior to filing his federal petition” would “undermine[] AEDPA’s goal of streamlining federal habeas proceedings”); *Duncan v. Walker*, 533 U.S. 167, 180 (2001).

Petitioner in this case is asking for Federal Defender Services to represent him in state clemency proceedings rather than state judicial proceedings, but that makes no difference. As the Sixth Circuit correctly recognized in applying its own precedent to this case, the same structural limitation bars state postconviction litigants from obtaining federal funding for *any* non-federal proceeding. Pet. Br. App. 11a. Indeed, except for the statutory reference to “executive *or other* clemency,” see pp. 23-27, *infra*, petitioner offers absolutely no reasons why his reasoning would not lead to federal funding for capital counsel in any state judicial proceedings that follow a round of federal habeas litigation.⁴ That result would run directly contrary to the goals of comity and federalism that are enshrined in Section 2254. A proper construction of Section 3599, by contrast, ensures that federal postconviction proceedings follow state review and

⁴ Indeed, even if Section 3599 were construed to permit funding for state-court litigation in some narrow circumstances (such as proceedings directly adjunct to a federal proceeding), funding for state clemency proceedings would still be unavailable, because of the substantive difference between federal habeas proceedings and state clemency proceedings. But if Section 3599 is construed to cover state clemency proceedings, it is difficult to see why funding for *all* state judicial proceedings (subsequent to the federal appointment of counsel) would not follow.

“avoid[s] the ‘unseemliness’ of a federal district court’s overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (citation omitted); see *id.* at 844 (exhaustion requirement is rooted in “[c]om-ity”).

4. Other aspects of the 1988 Act, and subsequent federal enactments in this area, confirm that Section 3599 was not intended to reshape the law of postconviction relief by dispatching federally funded lawyers to state court. Rather, the federal role has been limited to encouraging States themselves to provide capital defendants with counsel for postconviction review and other stages at which attorneys are not constitutionally required.

In the same statute that enacted what is now Section 3599, Congress added a supplemental appropriation for indigent criminal defense. 1988 Act, Tit. X, 102 Stat. 4541. Those funds were partially earmarked for five new death penalty habeas corpus resource centers, see 134 Cong. Rec. 33,279 (1988) (remarks of Rep. Whitten); *id.* at 33,291 (remarks of Rep. Conte), which was in addition to five more that had been funded just two months before, see H.R. Rep. No. 979, 100th Cong., 2d Sess. 51 (1988). These death penalty resource centers were a cooperative federal-state endeavor; federal funds were used for the federal component of indigent capital defense, and state funds were used for the state component. See *1988 Reports of the Proceedings of the Judicial Conference of the United States* 17, 73-74; see also Arthur W. Ruthenbeck, *You Don’t Have to Lose Your Shirt on Death Penalty Cases*, *Crim. Justice*, Spring 1988, at 10, 12 (veteran of the Administrative Office’s

Defender Services Committee confirming that “[t]he [Criminal Justice Act] generally limits federal defender representation to federal proceedings,” precluding them from “provid[ing] representation in collateral matters such as petitions to a governor for executive clemency,” whereas organizations receiving both federal and state funds can provide “continuity of representation”).

Since the 1988 Act, Congress has continued to encourage States to address concerns with the quality of postconviction representation in capital cases. One federal statute offers streamlined federal habeas review if a State provides adequate postconviction counsel in its own courts. See 28 U.S.C. 2261(b)(1), 2265(a)(1)(A). Another statute provides federal incentive grants to States that implement training programs to ensure the availability of trained capital defense counsel, at trial, on direct appeal, and on postconviction review. See Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, § 421, 118 Stat. 2286 (42 U.S.C. 14163 (Supp. V 2005)). But Congress expressly does *not* underwrite litigation in state court. See § 421(c)(2), 118 Stat. 2286 (Federal grants “shall not be used to fund, directly or indirectly, representation in specific capital cases.”).

B. The Legislative History Of Section 3599 Confirms That State Prisoners Are Not Entitled To Federal Funding For State Proceedings

The text and context of Subsection (e), particularly the careful use of the term “available” and the focus throughout Section 3599 on *federal* proceedings, are sufficient to rebut petitioner’s claim to federal funding for his state clemency application. But even if the provision were ambiguous, the legislative history of Section 3599 refutes petitioner’s assertion that the list of ser-

vices in Subsection (e) was deliberately crafted so that every service would be available both to habeas petitioners and to defendants on direct review. In fact, Subsection (e) was not written to apply to state habeas petitioners; they were added to the eligible class just a few hours before the bill passed both Houses of Congress in the final hours before the end-of-session adjournment.

The capital-punishment provisions of the 1988 Act were the first federal death-penalty statute enacted since this Court reaffirmed the constitutionality of capital punishment in *Gregg v. Georgia*, 429 U.S. 1301 (1976). They were intensely debated, and similar provisions had been defeated before. It is therefore unsurprising that the debate over adding a provision for federally funded counsel focused on the representation of federal defendants under the new federal death-penalty framework.

Funding for clemency counsel, along with other detailed rules for the appointment of counsel in death-penalty cases, was first added to the bill on the House floor, in an amendment by Representative Conyers. See 134 Cong. Rec. at 22,995-22,996. The Conyers amendment applied only to federal defendants and made *no* provision for the appointment of counsel for state prisoners filing federal habeas petitions. See *id.* at 22,995 (proposed Subsection (q)(1), making counsel available “in every criminal action in which a defendant is charged with a crime which may be punishable by death”).⁵ And

⁵ Petitioner contends that “[t]he provision for appointment of habeas counsel was actually added to the bill before the language requiring [representation] in available clemency proceedings.” Pet. Br. 29 n.25. But the provision petitioner cites offers him little support. The original death-penalty provision (the Gekas amendment) did contain a paragraph providing for appointment of counsel “[i]n any [capital] post-

the amendment provided that federally funded representation would extend to “proceedings for executive or other clemency.” *Ibid.* (proposed Subsection (q)(5)); *id.* at 22,996 (as modified). The Conyers amendment was adopted by voice vote. See *id.* at 22,997.

The bill then moved to the Senate, which began considering a comprehensive substitute bill that would have dropped the Conyers amendment. Compare 134 Cong. Rec. at 30,400-30,401, with *id.* at 22,984 (House death-penalty provision before adoption of Conyers amendment). Senator Levin then proposed a number of amendments, including provisions for appointment of counsel that restored and expanded on the Conyers amendment. See *id.* at 30,939; see also *id.* at 30,745-30,746 (sponsor’s explanation). The Levin text was adopted by unanimous consent and was in the bill that passed the Senate. Like the Conyers proposal, it provided funding for counsel for “executive or other clemency,” and it applied *only* to federal defendants and made no provision for the appointment of counsel for state prisoners. *Id.* at 30,939. Rather, Senator Levin described it as “providing for adequate representation for the defendant on appeal.” *Id.* at 30,746.

The amended bill returned to the House. After midnight on the last day of the session,⁶ the House passed the bill again, with further amendments. Inserted in the

conviction proceeding under section 2254 or 2255.” 134 Cong. Rec. at 22,984 (proposed Subsection (q)(4)). But that paragraph did not provide for representation outside federal court, let alone for clemency representation, federal or state. And it was superseded ninety minutes after adoption by the Conyers amendment, which completely rewrote Subsection (q) and deleted the reference to Section 2254 claimants.

⁶ See 134 Cong. Rec. at 33,150, 33,318 (bill debated between 12:30 a.m. and 1 a.m.).

provision for funding of counsel, without debate or explanation, was the provision now codified as Section 3599(a)(2), extending the eligibility for counsel to postconviction litigants under Sections 2254 and 2255 (whom the added text called “defendant[s],” presumably to fit the addition more easily into a statute that had been written for defendants rather than postconviction litigants). See 134 Cong. Rec. at 33,215. Shortly thereafter, at 3:16 a.m., the Senate agreed to the House amendments by voice vote and joined the House in adjourning for the year. *Id.* at 32,678.

This history demonstrates that the list of services set out in Subsection (e) was written to apply to federal defendants at trial and on direct review. When Congress made state postconviction litigants eligible for federal funding, it was not making a conscious effort to expand the federal role in the administration of the death penalty in the States. (To the contrary, Congress considered but postponed action on major changes to federal habeas review of state convictions, in anticipation of a report on the subject by retired Justice Powell. See 1988 Act, § 7323, 102 Stat. 4467.) Still less did Congress seek to create a federal role in state clemency proceedings for the first time.

C. Petitioner’s Interpretation Is Not Necessary To Give Meaning To “Executive Or Other Clemency”

The reference in Subsection (e) to “executive or other clemency” does not undo the natural reading of the statute or refute the confirming legislative history. Petitioner contends (Br. 23-24) that non-executive (“other”) clemency is used at the state level but not the federal level, and that Congress therefore must have contemplated funding clemency counsel at both levels. That

contention lacks merit. Neither the phrase itself, its history, nor the context of its enactment suggests that Congress included it as a subtle direction to assume responsibility for funding state-level clemency proceedings. Instead, the provision's legislative history plainly demonstrates that its authors intended it to apply purely to federal defendants.

First, it is implausible to think that Congress would have made an exception to the rule of federal funding for federal proceedings (discussed above) merely by including the ambiguous two-word phrase "or other." The resulting expansion of Section 3599's scope would be the kind of "radical departure[] from past practice" that Congress would state clearly, not by indirection. *Jones v. United States*, 526 U.S. 227, 234 (1999); see *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693-694 (1983). That is so especially because of the potential friction with values of federalism that would result from federal courts' appointing lawyers to litigate in state court or before state executive officials, and supervising their representation according to federal standards. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (courts should not lightly infer an intent to alter the federal-state balance); cf. *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam) (noting that "the licensing and regulation of lawyers" has been a state function "[s]ince the founding of the Republic"); *Columbus Bar Ass'n v. Torian*, 829 N.E.2d 1210, 1212-1214 (Ohio 2005) (disciplining attorney for deficient representation in pardon and commutation proceedings); *The Florida Bar v. Larkin*, 420 So. 2d 1080, 1080-1082 (Fla. 1982) (same).

Second, such a strained construction is not necessary to give meaning to the phrase "or other." Congress may

reasonably have sought to make clear that federal prisoners could receive funding for proceedings before the Executive himself *and* for proceedings before other persons whom he may enlist to help review clemency applications. See, *e.g.*, 28 C.F.R. 1.10(c) (providing for an oral presentation to the Office of the Pardon Attorney by counsel for federal prisoners under a death sentence). Indeed, history shows that these other persons may not be officials of the Executive Branch at all. Faced with large numbers of pardon applications relating to draft evasion, both Presidents Truman and Ford empaneled commissions of distinguished citizens—including former members of the Judicial and Legislative Branches—to make recommendations on individual applications.⁷ In some cases these boards held hearings and took personal testimony.⁸ Proceedings before federal entities of this sort are far more likely to have been what Congress meant by the phrase “or other.”

Third, it is abundantly clear from the legislative history of Section 3599 that “executive or other clemency” was written to refer exclusively to federal proceedings. As detailed above, in both the House and the Senate, funding for counsel in “proceedings for executive or other clemency” was added to the bill at a time when the

⁷ See Exec. Order No. 9814, 3 C.F.R. 594 (1943–1948 comp.); *Statement by the President upon Signing Order Creating an Amnesty Board to Review Convictions Under the Selective Service Act*, Pub. Papers 511 (1946) (appointing former Justice Owen Roberts as chairman); Exec. Order No. 11,803, 3A C.F.R. 168 (1974 comp.); Presidential Clemency Board, *Report to the President* 219-224 (1975) (*Clemency Board Report*) (detailing the Board’s membership, including former Senator Charles Goodell as chairman, various federal and state officials, and private citizens).

⁸ *Clemency Board Report* 25-26.

bill applied *only* to federal defendants. See pp. 21-22, *supra*. Plainly, therefore, neither chamber intended “or other” to refer to proceedings on the state level, because both chambers adopted the “or other” language at a time when they contemplated funding *no* proceedings on the state level.

Fourth, petitioner (relying on the Tenth Circuit’s opinion in *Hain*) significantly overstates the existence of non-executive clemency even on the state level. Pet. Br. 24. For instance, the Tenth Circuit asserted that in Connecticut the clemency power is legislative in nature; but both in 1988 and today, the clemency power was and is exercised by a board of gubernatorial appointees. Conn. Gen. Stat. Ann. § 54-124a (West Supp. 2008). Cf. Pet. Br. 24 n.23 (asserting that a board of executive appointees is necessarily part of an “executive,” not “other,” clemency proceeding); *Hain*, 436 F.3d at 1174 n.7 (same). The Tenth Circuit also suggested that in some other States the legislature may grant clemency. But in each of those States that is true only for the offense of treason against the State, a noncapital (and largely defunct) crime, see, *e.g.*, Fla. Stat. Ann. §§ 876.32, 775.082(3)(b) (West 2001). In capital cases executive officials (the governor, gubernatorial appointees, or other elected officials such as the attorney general) exercise the clemency power. See Fla. Const. Art. IV, § 8; Idaho Const. Art. IV, § 7; Idaho Code Ann. § 20-210 (2004); Ind. Const. Art. V, § 17; Ky. Const. § 77; Neb. Const. Art. IV, § 13; N.Y. Const. Art. 4, § 4; Ohio Const. Art. III, § 11; Or. Const. Art. V, § 14; Utah Const. Art. 7, § 12; Wyo. Const. Art. 4, § 5. Accord Governors’ Br. 4-5. Finally, in California and Nevada, the justices of the state supreme court can block clemency in some cases, but actually *granting* clemency always requires

the governor’s approval. See Cal. Const. Art. V, § 8(a); Nev. Const. Art. 5, § 14(1).⁹ Thus, contrary to the Tenth Circuit’s suggestion (and petitioner’s), clemency in capital cases is in fact an executive function throughout the Nation. Accord Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction* 23 (2006). At a minimum, at the time Section 3599 was originally enacted, non-executive clemency was not a regular feature of state death-penalty proceedings. Thus, there would be no reason to think that Congress included the words “or other” to refer to such a practice on the state level, even if the legislative history did not conclusively show that Congress wrote the phrase “executive or other clemency” with federal defendants in mind.

D. Congress’s 2006 Recodification Removed Any Doubt By Ratifying The Consensus View That Section 3599 Funds Only Federal Proceedings

When Congress re-enacted the former Section 848(q)(4)-(10) as Section 3599 and made no substantive change, it is presumed to have consciously ratified the settled interpretation of the statute’s language. See, e.g., *Keene Corp. v. United States*, 508 U.S. 200, 212-213 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Although petitioner contended at the petition stage (Pet. 15-16) that this principle supported his position, he now argues only that there was “no settled judicial interpre-

⁹ The Tennessee Supreme Court can recommend commutation of a death sentence based on “extenuating circumstances,” but the ultimate decision is the governor’s. Tenn. Code Ann. §§ 40-27-105, 40-27-106 (2006). Petitioner does not claim that he is eligible for a form of “other clemency” under this procedure. See Pet. Br. App. 27a (petitioner intends to seek clemency “from the Governor”).

tation” of the former statute when Congress recodified it. Pet. Br. 29. That contention is incorrect, because the only appellate decision that petitioner identifies as “unsettling” the law at the time of the 2006 recodification is an Eighth Circuit opinion relying on an aspect of the statute that no longer existed in 2006.

Congress finalized the text of Section 3599 in December 2005, when a House-Senate conference committee reported out the finished product. See H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 1 (2005).¹⁰ The only circuits to have taken a position on the existing language by then—the Fifth, Sixth, and Eleventh—had all held that it applies only to federal proceedings. *King*, 312 F.3d at 1366-1368 (no application to state clemency proceedings); *Clark*, 278 F.3d at 461-463 (same); *House*, 332 F.3d at 997 (no application to litigation in state court); *Sterling*, 57 F.3d at 458 (same); *Lindsey*, 875 F.2d at 1506-1507 (same).

At that time the single appellate decision leaning in the other direction was *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993).¹¹ The Eighth Circuit denied funding for

¹⁰ Final passage by the Senate took some months for unrelated reasons, see 152 Cong. Rec. S1631-S1632 (daily ed. Mar. 2, 2006), because the statute was part of the USA PATRIOT Act reauthorization. By that time the en banc Tenth Circuit had adopted petitioner’s reading. *Hain*, 436 F.3d at 1170. As we noted at the petition stage, that development postdated not only the crafting of the recodification language but also passage by the House, and it is therefore entitled to little or no weight in divining legislative intent to ratify prevailing law. U.S. Cert. Amicus Br. 15-16. Petitioner does not dispute this point. See Pet. Br. 29-31.

¹¹ Petitioner also points to a few district court decisions, which were not binding precedent even in the courts that rendered them, and which accordingly do not refute the courts of appeals’ contrary consensus. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-386 &

state clemency proceedings. The court concluded that federal funding is plainly not available to pursue unexhausted claims in state court, but it thought the availability of federal funding for state clemency or competency proceedings was “far less clear.” *Id.* at 803. While the court thought “[t]he plain language of § 848(q) evidences a congressional intent to insure that indigent state petitioners receive ‘reasonably necessary’ competency and clemency services from appointed, compensated counsel,” it also acknowledged that such a reading would create perverse incentives to file federal habeas petitions to qualify for federal funding for state proceedings. *Ibid.* The court resolved the tension by turning to statutory language that, at the time, limited attorney compensation to “amounts * * * reasonably necessary to carry out the requirements of” the statute. 21 U.S.C. 848(q)(10) (1994). That “reasonably necessary” language, the Eighth Circuit held, required three inquiries before approving funding for a state competency or clemency proceeding: whether the underlying federal habeas petition was frivolous; whether state law provides no avenue to obtain compensation for these services; and (in most cases) whether counsel requested authorization before performing the services. 992 F.3d at 803. The Eighth Circuit denied funding based on counsel’s failure to satisfy any of the three preconditions; the underlying Section 2254 petition had been frivolous and Arkansas might pay for clemency counsel. See *id.* at 803-804.

n.21 (1983) (recognizing that Congress ratified a “well-established judicial interpretation” notwithstanding two contrary district court decisions); cf. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988) (noting that “the almost uniform *appellate* interpretation” contradicted the position supposedly ratified by Congress) (emphasis added).

Congress subsequently deleted the “reasonably necessary” criterion. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 903(b), 110 Stat. 1318. Attorneys’ appointment and compensation no longer turn on a finding of reasonable necessity. See 18 U.S.C. 3599(g)(1) and (2).

The Eighth Circuit did not have to resolve the question presented here, because it was able to deny funding based on what it considered to be limiting language. Whether, without that limiting language, it would have decided in petitioner’s favor a question it deemed “far less clear” (*Hill*, 992 F.2d at 803) is difficult to determine. But what it *did* decide was that the language about reasonable necessity had considerable (indeed, dispositive) significance. And that language was deleted ten years before the statute’s re-enactment. Although some district courts in the Eighth Circuit have continued to approve funding for state clemency counsel based on *Hill*, ultimately the discussion on which petitioner relies was dictum, and it therefore is not relevant to the existence of a settled judicial consensus. See *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005) (“Dictum settles nothing, even in the court that utters it.”).

E. Congress Had Valid Reasons For Restricting Federal Funding To Federal Proceedings

Petitioner and his amici devote considerable effort to establishing the relatively uncontroversial proposition that an indigent’s clemency application is more likely to be persuasive with a lawyer’s help than without it. Congress recognized as much in providing clemency counsel for indigent *federal* inmates who are sentenced to death. But petitioner does not provide any basis from which to

conclude Congress intended federal funding for proceedings purely on the state level.

One amicus asserts that providing federal funding for counsel in federal habeas proceedings but not in state clemency proceedings would be “altogether irrational.” Constitution Project Br. 8. In fact, Congress could conclude, entirely rationally, that the federal interest in indigent defense (over and above that required by the Sixth Amendment) extends to federal-court proceedings to protect federal *constitutional* rights, but not to state clemency proceedings, which may turn on a host of practical and political considerations and in which no distinct federal rights are at stake. Likewise, Congress may have decided that funding lawyers with federal tax dollars to represent defendants in such state clemency proceedings would present unique federalism concerns.

In habeas proceedings, federally appointed counsel focus on developing evidence and argument relevant to “violation[s] of the Constitution or laws or treaties of the United States,” 28 U.S.C. 2254(a), rather than on arguments cognizable only under state law or appeals to the executive’s discretion (such as contrition or good works while in prison). Some constitutional claims (such as mental illness, unconstitutionally ineffective failure to develop mitigating evidence, or withholding of exculpatory evidence) would also have a bearing on clemency. But the primary legal forums for developing and vindicating such claims are state courts and federal habeas proceedings, not state clemency. Capital inmates currently have access to counsel in both of those primary forums. Virtually every State offers postconviction

counsel to indigent capital defendants.¹² And Congress has acted to encourage States to make improvements in that area—while disclaiming any role in funding state postconviction litigation for individual inmates. See p. 20, *supra*.

Nor is it the case that federal funding for clemency counsel is necessary to ensure continuity of representation between federal habeas counsel and clemency counsel (Pet. Br. 33-34; Governors’ Br. 18-19). Most counsel appointed under Section 3599 are not federal defender organizations, as in this case, but private attorneys selected from a panel of available counsel. See Subcomm. on Fed. Death Penalty Cases, Judicial Conf. of the U.S., *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* §§ I(C)(4), II(4) (May 1998) <<http://www.uscourts.gov/library/dpenalty/4REPORT.htm>>. Provided these attorneys have the requisite bar membership, they may well be able to transition into the role of clemency counsel if appointed to that role under state law.¹³ In any event, this “continuity” argument proves too much; on petitioner’s reasoning, once a prisoner seeks federal habeas relief, *no* State should provide new counsel for state clemency (or successive state habeas) proceedings, and the federally appointed lawyer should remain with

¹² See, e.g., Constitution Project Amicus Br. at 2-3, *Barbour v. Allen* (No. 06-10605) (informing this Court that every death-penalty State except Alabama pays for postconviction counsel in capital cases). The same amicus suggests here that “[m]any states do not guarantee counsel in state habeas proceedings at all,” Constitution Project Br. 7, but omits the special provision for capital cases that it has previously brought to this Court’s attention.

¹³ See, e.g., *Marks v. Superior Court*, 38 P.3d 512, 518 (Cal. 2002); Fla. Stat. Ann. §§ 27.5303(4)(b), 27.5304(5)(b) (West Supp. 2008).

the case permanently. As discussed above, p. 20, *supra*, Congress would not have meant to displace States' commendable efforts to fund their own indigent-defense efforts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3599 provides:

Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either—

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had

not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on be-

half of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than \$125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed \$7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

2. 28 U.S.C. 2253 provides in pertinent part:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

* * * * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

* * * * *

3. 28 U.S.C. 2244 provides in pertinent part:

Finality of determination

* * * * *

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a per-

son in custody pursuant to the judgment of a State court. * * *

* * * * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

4. 28 U.S.C. 2254 provides in pertinent part:

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the

applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * * * *

5. 28 U.S.C. 2261 provides in pertinent part:

Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) COUNSEL.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

* * * * *

6. 28 U.S.C. 2265 provides in pertinent part:

Certification and judicial review

(a) CERTIFICATION.—

(1) IN GENERAL.—If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) EFFECTIVE DATE.—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) ONLY EXPRESS REQUIREMENTS.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) REGULATIONS.—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

* * * * *

7. The Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, Subtit. B, 118 Stat. 2286-2288 (42 U.S.C. 14163-14163a (Supp. V 2005)), provides in pertinent part:

SEC. 421. CAPITAL REPRESENTATION IMPROVEMENT GRANTS.

(a) **IN GENERAL.**—The Attorney General shall award grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases.

(b) **DEFINED TERM.**—In this section, the term “legal representation” means legal counsel and investigative, expert, and other services necessary for competent representation.

(c) **USE OF FUNDS.**—Grants awarded under subsection (a)—

(1) shall be used to establish, implement, or improve an effective system for providing competent legal representation to—

(A) indigents charged with an offense subject to capital punishment;

(B) indigents who have been sentenced to death and who seek appellate or collateral relief in State court; and

(C) indigents who have been sentenced to death and who seek review in the Supreme Court of the United States; and

(2) shall not be used to fund, directly or indirectly, representation in specific capital cases.

(d) **APPORTIONMENT OF FUNDS.**—

(1) IN GENERAL.—Of the funds awarded under subsection (a)—

(A) not less than 75 percent shall be used to carry out the purpose described in subsection (c)(1)(A); and

(B) not more than 25 percent shall be used to carry out the purpose described in subsection (c)(1)(B).

(2) WAIVER.—The Attorney General may waive the requirement under this subsection for good cause shown.

(e) EFFECTIVE SYSTEM.—As used in subsection (c)(1), an effective system for providing competent legal representation is a system that—

(1) invests the responsibility for appointing qualified attorneys to represent indigents in capital cases—

(A) in a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in capital cases;

(B) in an entity established by statute or by the highest State court with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors; or

(C) pursuant to a statutory procedure enacted before the date of the enactment of this Act under which the trial judge is required to appoint qualified attorneys from a roster maintained by a

State or regional selection committee or similar entity; and

(2) requires the program described in paragraph (1)(A), the entity described in paragraph (1)(B), or an appropriate entity designated pursuant to the statutory procedure described in paragraph (1)(C), as applicable, to—

(A) establish qualifications for attorneys who may be appointed to represent indigents in capital cases;

(B) establish and maintain a roster of qualified attorneys;

(C) except in the case of a selection committee or similar entity described in paragraph (1)(C), assign 2 attorneys from the roster to represent an indigent in a capital case, or provide the trial judge a list of not more than 2 pairs of attorneys from the roster, from which 1 pair shall be assigned, provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation;

(D) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases;

(E)(i) monitor the performance of attorneys who are appointed and their attendance at training programs; and

“(ii) remove from the roster attorneys who—

“(I) fail to deliver effective representation or engage in unethical conduct;

“(II) fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs; or

“(III) during the past 5 years, have been sanctioned by a bar association or court for ethical misconduct relating to the attorney’s conduct as defense counsel in a criminal case in Federal or State court; and

(F) ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, who shall be compensated—

(i) in the case of a State that employs a statutory procedure described in paragraph (1)(C), in accordance with the requirements of that statutory procedure; and

(ii) in all other cases, as follows:

(I) Attorneys employed by a public defender program shall be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.

(II) Appointed attorneys shall be compensated for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in

cases reflecting the complexity and responsibility of capital cases.

(III) Non-attorney members of the defense team, including investigators, mitigation specialists, and experts, shall be compensated at a rate that reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

(IV) Attorney and non-attorney members of the defense team shall be reimbursed for reasonable incidental expenses.

SEC. 422. CAPITAL PROSECUTION IMPROVEMENT GRANTS.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of enhancing the ability of prosecutors to effectively represent the public in State capital cases.

(b) USE OF FUNDS.—

(1) PERMITTED USES.—Grants awarded under subsection (a) shall be used for one or more of the following:

(A) To design and implement training programs for State and local prosecutors to ensure effective representation in State capital cases.

(B) To develop and implement appropriate standards and qualifications for State and local prosecutors who litigate State capital cases.

(C) To assess the performance of State and local prosecutors who litigate State capital cases,

provided that such assessment shall not include participation by the assessor in the trial of any specific capital case.

(D) To identify and implement any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases.

(E) To establish a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate.

(F) To provide support and assistance to the families of murder victims.

(2) PROHIBITED USE.—Grants awarded under subsection (a) shall not be used to fund, directly or indirectly, the prosecution of specific capital cases.

* * * * *